United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

77-7213

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FOR THE SECOND CIRCUIT

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SECOND CIRCUIT

JOHN ESPOSITO,

Plaintiff-Appellee,

—against—

UNITED STATES NAVIGATION INC.,

—and—

SCINDIA STEAM NAVIGATION CO. LTD.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING
SUGGESTION FOR REHEARING IN BANC

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We appreciate the utility of summary affirmance if an opinion would be supererogatory. But summary affirmance on Judge Mishler's opinion below is harmfully mystifying. As the Court apprehended during argument, the rationale of Judge Mishler's opinion is obscure. Without a clarifying opinion, the affirmance affords no guidance to bench or bar. What rule(s) of law did the Court affirm? For future commercial and insurance purposes*, shipowners and their agents need to know why the Court agrees that the agent can be liable on any ground other than negligence for injury caused by a latent barge defect

* Appellant agent's $116,160 loss was uninsured because no knowledgeable person foresaw any risk of liability.

existing before the agent hired the barge, and why the principal can be secondarily liable.

By referring to the "warranty of seaworthiness" (45a), Judge Mishler seemingly held that the agent as demisee was liable for unseaworthiness (as distinguished from negligence) for the barge's latent pre-demise defect. He cited no supporting authority and the parties have found none. If Judge Mishler meant that the agent was liable for negligent failure to discover and rectify the defect, his opinion is fatally inconsistent.

He found "that the defect in the beams supporting the deck could not be discovered by a reasonable inspection. * * * The defect in the support of the deck at the site of the injury was a latent defect." (46a). The Court suggested during argument that perhaps those findings pertain only to the third-party defendant stevedore. Such a limited construction is insupportable. On undisputed testimony (9a, 12a, 18a, 20a, 23a), Judge Mishler found that: "The deck in that area [which gave way beneath plaintiff] appeared to be safe and able to support the weight of the longshoremen and cargo." (43a). Plaintiff testified:

> "Q. Mr. Esposito, the fact of the matter is that you walked over that very spot where your accident eventually took place at least 20 or 30 times? A. Even more. Q. It looked all right to you? A. Yes, sir." (23a)

By denying appellant shipowner indemnity from plaintiff's stevedore employer (46a) and awarding plaintiff 100% of his recoverable damages (49a), Judge Mishler implicitly held that plaintiff was not contributorily negligent. If plaintiff with more than 20-30 on site opportunities could not discern the defect in the exercise of reason-

able care, appellant agent could not be held negligent for failure to discover the latently defective beams supporting the deck "by a reasonable inspection", particularly as the agent had no special reason to inspect the barge since the barge owner warranted that it was seaworthy when the agent hired it; the stevedore employer was primarily responsible for plaintiff's safety; and it was the job of the owner's barge captain to inspect and maintain the barge (27a) and notify the owner of damage which was repaired at the owner's yard (30a-31a).

Even less explicable is Judge Mishler's holding that appellant shipowner is liable "on the traditional concept of respondeat superior" (45a). If the agent is liable as demisee, the shipowner could not be liable *pro hac vice,* and if the agent is not liable, the shipowner could not be secondarily liable.

Much more is at stake than whether plaintiff wins or appellants lose $116,160. Fundamental law has been either vitiated or significantly modified, and the opinion below should be either reversed or explicated. Justice demands no less.

Respectflly submitted,

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